in such normal redistricting efforts,[2] the impingement on various voters' First Amendment rights is justified in such circumstances because drawing new lines also serves important state interests.

But this is not the usual case. As noted above, redistricting in the modern era has been limited to those situations *where no valid map exists*. Indeed, "[s]ince 1910, when the House was fixed in size at 435, the norm has been that a census is followed by reapportionment across states to fit the population, and is followed in turn by redistricting within the states. After 1910, no state undertook a second redistricting within the 10-year period between censuses except when ordered by the courts." Norman Ornstein, *One Person, One Vote Is Vital – When It's Applied Within Reason*, Roll Call, Dec. 14, 2005, at 2, *available* at 2005 WLNR 20068295. In other words, redistricting has occurred when it needs to occur – usually when new census data render extant maps invalid under the one-person, one-vote principle.

Here, by contrast, redistricting was undertaken even though the existing Congressional map was valid and would have remained so until the next census. *See* Tex. Att'y Gen. Op. GA-0063 (Apr. 23, 2003) (concluding that State law did not require a new map and that 2001 map would remain valid until 2010 census). It was also undertaken without reference to any new population data – and without any effort to obtain or create such data – that could in theory justify a mid-decade redistricting. These differences are of pro-

---

[2] See *Vieth*, 541 U.S. at 285 ("The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics."); *Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition"); *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("Politics and political considerations are inseparable from districting and apportionment. . . . The reality is that districting inevitably has and is intended to have substantial political consequences.").

found consequence, because they squarely raise the question whether any cognizable state interest was served by the promulgation of a new map in 2003.

Indeed, the normal presumption that new maps are valid should not apply here without (at the very least) a careful examination of what interest the State has offered in place of the valid interests at stake when redistricting to replace an invalid map. The absence of those interests in the context of replacing a valid map means that there is necessarily a new balance of interests under this Court's "flexible standard" for measuring burdens on First Amendment rights under election regulations.

Without the usual presumptions in place, heightened scrutiny is triggered due to the burdens on expression inherent in redistricting and present to a self-evident degree here. Redistricting based on instincts of political self-preservation or partisan gain implicates "the First Amendment interest of not burdening or penalizing citizens because of their participation in the electoral process, their voting history, their association with a political party, or their expression of political views." *Vieth*, 541 U.S. at 314 (Kennedy, J., concurring in the judgment) (citing *Elrod v. Burns*, 427 U.S. 347 (1976) (plurality opinion)). This is so because voters are entitled to vote their conscience and to align with political parties that share their views without the specter of viewpoint-based government action predicated on the exercise of that expression. In this instance, the Texas Legislature chose to redraw two-year-old district lines that had been drawn to reflect voting trends in the State and that had in the prior election produced results consistent with expectations solely and specifically to suppress further the representation of their political opposition.

It is neither surprising nor significant that this Court has not previously employed this flexible standard in a partisan gerrymandering case. This Court has often extended its First

Amendment jurisprudence in the past to account for new sets of circumstances. *See Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 740 (1996) ("The history of this Court's First Amendment jurisprudence, however, is one of continual development, as the Constitution's general command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press,' has been applied to new circumstances requiring different adaptations of prior principles and precedents. The essence of that protection is that Congress may not regulate speech except in cases of extraordinary need and with the exercise of a degree of care that we have not elsewhere required."). Indeed, members of this Court have already recognized the relevance of the First Amendment in the partisan gerrymandering context. *See Vieth*, 541 U.S. at 314-15 (Kennedy, J., concurring in the judgment); *id.* at 324-25 (Stevens, J., dissenting).

For these reasons, the Texas Legislature's decision to draw patent viewpoint-based classifications during an unprecedented mid-decade redistricting in which no new population data was used requires the application of heightened judicial scrutiny.

II. THE TEXAS REDISTRICTING PLAN IS INVALID UNDER THIS COURT'S FLEXIBLE STANDARD FOR EVALUATING ELECTION REGULATIONS

Texas cannot identify a state interest that is sufficiently important to justify the First Amendment burdens imposed by the 2003 Plan. Between them, Texas and the court below identified two purported state interests. Although the State on remand principally asserted that its actions should be considered nonjusticiable, it also argued that it had a valid purpose in realigning the map to make "Texas's congressional delegation more like Texas's voting patterns." *See* State Defs' Opening Br. on Remand, *available* at 2003 WL 24051486. The three-judge panel below endorsed that principle and identified a second putative state interest: permit-

ting state *legislatures* to replace even valid court-drawn maps. *See Henderson v. Perry*, 399 F. Supp. 2d 756, 767-69 (E.D. Tex. 2005) (political purposes) (citing *Gaffney*, 412 U.S. at 754); *id.* at 775-76 & n.82 (replacing court-drawn maps) (collecting cases). Even if these ostensible interests provided "rational" bases for legislation – which the Center does not concede – they could not rise to the level of "important" state interests satisfying any form of heightened scrutiny.

1. The only interest actually advanced by the State of Texas below was that of securing a "congressional delegation more like Texas's voting patterns" at a time when a current and valid districting map was in effect. Put more directly, the State argues that it has an important state interest in securing further partisan advantage for one political party in the state's congressional delegation over others. Such a bare desire to advantage one political party and harm others based on their political views is not even considered a legitimate state interest, let alone an important one. A State has no legitimate interest in the success of any particular political party. *See Abate v. Mundt*, 403 U.S. 182, 187 (1971) (indicating that partisanship in favor of groups was not a legitimate state interest sufficient to justify population deviations among legislative districts); *Kirkpatrick v. Preisler*, 394 U.S. 526, 534 (1969) (same). If this were not so, then all sorts of discriminatory election laws might be permissible. *See Vieth*, 541 U.S. at 312 (Kennedy, J., concurring in the judgment) ("If a State passed an enactment that declared 'All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles,' we would surely conclude the Constitution had been violated.").

In addition, the fact that Texas frames its interest in electing more Republicans to Congress in terms of an interest in

better reflecting Texas voting patterns does not make the asserted interest any more capable of surviving heightened scrutiny. The notion that there is such a thing as a fairly "balanced" map that accurately reflects statewide voting patterns is illusory. A party's share of the vote varies from race to race and election cycle to election cycle, and which race or aggregation of races constitutes the appropriate proxy essentially is a matter of perspective. A state interest that is so elusive and ephemeral by nature cannot be an "important" state interest sufficient to justify burdening certain voters' First Amendment rights. To hold otherwise would be to invite States to draw new lines for every election cycle on the grounds that – based on whatever race a State wished to use at the moment – the new map better reflected statewide voting patterns. Permitting States to re-redistrict whenever they believed that the current map failed to sufficiently reflect statewide voting patterns would result in constant re-redistricting that would wreak the kind of "chaos" on the "democratic processes" that is antithetical to the very purpose of election regulations.[3] *Burdick*, 504 U.S. at 433 (quotation omitted).

2. The other interest offered by the court below fares no better. The panel explained that it is "within the prerogative

---

[3] Of course, a State may attempt to achieve what it believes to be a politically balanced map in the course of normal redistricting. *See Gaffney*, 412 U.S. at 754. But merely because it is permissible for a State to pursue such an end does not mean that political balance is an important state interest. Indeed, unlike the predicates for a traditional redistricting, political balance is neither a constitutional nor a legal requirement. *See Davis*, 478 U.S. at 130 ("Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be."); *id.* at 131 ("*Gaffney* in no way suggested that the Constitution requires the approach that Connecticut had adopted in that case.").

of the state legislatures" "to draw their own map to replace one imposed by a court." *Henderson*, 399 F. Supp. 2d at 775. But the court strained to find any precedent to support such a broadly framed proposition, settling instead for two cases that involved court-made maps that – unlike the 2001 map – contained built-in expiration dates and another case arising under circumstances entirely unlike those in this case. *See id.* at 775 n.82 (collecting cases). It failed to identify any precedent that demonstrates that a State's purported interest in permitting a legislature to replace a valid court-imposed map is sufficiently important to justify the infringement of certain voters' core expressive rights.

To be sure, this Court has recognized that, in the absence of an extant valid map, a new map drawn by a state legislature is preferable to one drawn by a federal court. *E.g.*, *Gaffney*, 412 U.S. at 749 ("Nor is the goal of fair and effective representation furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan . . . . From the very outset, we recognized that the apportionment task, dealing as it must with fundamental 'choices about the nature of representation,' . . . is primarily a political and legislative process.") (quoting *Burns v. Richardson*, 384 U.S. 73, 92 (1966), and citing *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)); *see also Branch v. Smith*, 538 U.S. 254, 262 (2003); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977). But that principle was not abrogated here. The intervention of a federal court in this case was made necessary only by the Texas Legislature's inability to perform its duty following the 2000 census. When the legislature is unable to complete its task in a timely fashion, a court may step in and promulgate a new set of lines. *Connor*, 431 U.S. at 415. The fact that there is a *preference* for having legislatures rather than courts draw district lines when new maps need to be drawn does not

mean the State has any interest, much less an "important" one, in replacing a court-drawn map with one drawn by the legislature.

Moreover, the insufficiency of this purported state interest is further made apparent by the fact that the 2003 Plan governed *Congressional* elections, matters which are not within a State's unfettered discretion to regulate. The Texas Legislature's authority to draw the boundaries of Congressional districts does not inhere in its sovereign power as a State. Rather, this authority derives from the Elections Clause of the United States Constitution, which permits States to regulate only the "Times, Places, and Manner" of elections for the U.S. House of Representatives. U.S. Const. art. I, § 4. Importantly, this Court has made clear that a state legislature's power to regulate federal elections – including its redistricting power – was not one of the powers "reserved by" the States under the Tenth Amendment. *Cook v. Gralike*, 531 U.S. 510, 522 (2001) ("Because any state authority to regulate election to those offices could not precede their very creation by the Constitution, such power 'had to be delegated to, rather than reserved by, the States.'") (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995)). Just as important, "the Framers understood the Elections Clause as a grant of authority to issue procedural regulations, and *not as a source of power to dictate electoral outcomes*, to favor or disfavor a class of candidates, or to evade important constitutional restraints." *Thornton*, 514 U.S. at 833-34 (emphasis added). By definition, a State cannot have an important interest in permitting the legislature to craft a map that "dictate[s] electoral outcomes" when a valid court-crafted map already secures the State's other legitimate interests.[4]

---

[4] This is not to say that a State can never have an interest in permitting a legislature to replace a court-drawn map. The Center does not dispute that a legislative map that replaced a court-imposed one could be

3. Finally, even assuming that one of these asserted state interests was sufficiently important to justify replacing the valid 2001 Plan with a new Congressional map, the 2003 Plan is not narrowly tailored to that purpose. As noted above, election regulations that burden voters' First and Fourteenth Amendment rights are evaluated under a flexible standard and the constitutional harm inflicted should not significantly exceed the important state interest being served. *Burdick*, 504 U.S. at 434. In drafting the 2003 Plan, however, the Texas Legislature utilized 2000 census data – data which was by then three years out of date. In so doing, the Legislature not only burdened certain voters' fundamental rights, but it also drew districts in a manner wholly indifferent to the one-person, one-vote constitutional requirement. Even if "partisan balancing" or legislative prerogative is a sufficiently important ground for redrawing a valid Congressional map, neither supposed interest can justify drawing a new map that makes no effort to ensure actual population equality exists between Congressional districts.[5]

---

valid, even if done mid-decade, if it advanced an important state interest, such as updating population data, without unnecessarily classifying voters on the basis of their expressive rights.

[5] The Center does not suggest that the 2001 Plan's districts presently contain equal populations or that they contained equal populations at the time the 2003 Plan was enacted. Rather, it merely points out that, at the time the 2001 Plan was put in place, that Plan created districts with equal populations based on population data that was valid for that redistricting. In contrast, the 2003 Plan used population data which, for the reasons set forth by the *Travis County* appellants, was not valid for that redistricting. Thus, regardless of the extent to which the districts under the 2003 Plan actually deviate from population equality, the fact remains that the 2003 Plan was enacted without any regard for the one-person, one-vote constitutional requirement and without any effort to minimize actual population deviations. The Center merely posits that a mid-decade redistricting that involves the redrawing of valid district lines should not be deemed to be sufficiently tailored to an important state interest absent an effort to create actual population equality.

III. THE FLEXIBLE STANDARD IS NEITHER UNLIMITED NOR UNMANAGEABLE AS APPLIED TO THE REDISTRICTING PLAN IN THIS CASE

The foregoing framework for analyzing mid-decade partisan gerrymandering claims is both limited in application and sufficiently manageable. For the reasons stated above, this Court's flexible standard, which it has already applied in the context of other election regulations, has limited applicability to a map promulgated to satisfy a State's obligation to comply with one-person, one-vote requirements. That interest is concededly a compelling one, and in such cases the federal courts cannot "tie the hands of States," even though the new maps "will invariably impose some burden upon individual voters." *Burdick*, 504 U.S. at 433. Indeed, it is uncertain whether this framework would even result in the invalidation of all mid-decade redistricting plans.

In addition, the standard is also a manageable one. This Court already has a wealth of experience in applying the flexible standard to other election regulations that burden voters' First Amendment rights. That precedent provides guideposts for applying the test in a consistent and predictable way. Furthermore, in contrast to the standard partisan gerrymandering case, this standard does not require this Court to judge how much partisanship is too much. Instead, this Court merely needs to examine whether a State can provide an important state interest that would justify redistricting when a valid map was already in place.

CONCLUSION

For the foregoing reasons, and for the reasons stated by appellants, this Court should reverse the ruling of the District Court and remand the case with instructions to reinstate the valid map promulgated by the Eastern District of Texas.

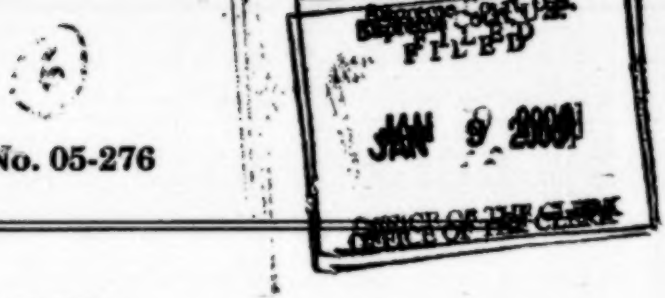
Respectfully submitted,

JEFFREY M. WICE
P.O. Box 42442
Washington, D.C. 20015
(202) 494-7991

WALTER DELLINGER
(Counsel of Record)
JONATHAN D. HACKER
MATTHEW M. SHORS
CHARLES E. BORDEN
GEOFFREY M. WYATT*
O'MELVENY & MYERS LLP
1625 Eye Street, N.W.
Washington, D.C. 20006
(202) 383-5300
*admitted only in New York: supervised by principals of the firm

Attorneys for Amicus Curiae

Dated: January 10, 2006



No. 05-276

In The

Supreme Court of the United States

EDDIE JACKSON, *et al.*,

Appellants,

v.

RICK PERRY, *et al.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Texas

BRIEF FOR AMICUS CURIAE NEIL H. COGAN IN SUPPORT OF APPELLANTS

NEIL H. COGAN
WHITTIER LAW SCHOOL
3333 Harbor Boulevard
Costa Mesa, CA 92626
(714) 444-4141 ext. 111

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICUS	1
SUMMARY OF ARGUMENT	1
ARGUMENT	3
I. LEGISLATIVE DISTRICTING AND REDISTRICTING SHOULD AFFORD AFFECTED GROUPS A FAIR AND ADEQUATE OPPORTUNITY TO PARTICIPATE IN AN UNDICTATED PROCESS	3
II. THIS COURT SHOULD REVERSE AND REMAND FOR A TRIAL ON WHETHER THE REDISTRICTING PROCESS WAS FAIR, ADEQUATE, AND UNDICTATED	6
CONCLUSION	13

TABLE OF AUTHORITIES

Page

CASES

Davis v. Bandemer, 478 U.S. 109 (1986) 1, 3

Vieth v. Jubelirer, 541 U.S. 267 (2004) 1, 3

OTHER AUTHORITIES

Adam Nagourney, *The New York Times*, February 7, 2005, Section A, p. 19, col. 1 4

Austin American-Statesman, April 25, 2003, Metro/State Section, p. B6 10

Fort Worth Star Telegram, April 24, 2003, Final Edition, Metro Section, p. 4 8

Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv. L. Rev. 594 (2002) 6

Note, *Toward a Greater State Role in Election Administration*, 118 Harv. L. Rev. 2314 (2005) 5

Pildes, *Forward: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28 (2004) 3

The Dallas Morning News, April 23, 2003, Second Edition, News Section, p. 5A 8

The Dallas Morning News, October 16, 2003, Texas Section, p. 6A 11

The Houston Chronicle, February 10, 2003, Section A, p. 13 7

The Houston Chronicle, February 22, 2003, Section A, p. 30 8

The Houston Chronicle, April 23, 2003, 3 Star Edition, Section A, p. 27 8

The Houston Chronicle, May 6, 2003, Section A, p. 1 10

TABLE OF AUTHORITIES – Continued

Page

The New York Times, May 13, 2003, Section A, p. 24 10

The New York Times, May 15, 2003, Section A, p. 1 11

The New York Times, May 22, 2003, Section A, p. 16 11

The New York Times, May 27, 2003, Section A, p. 24 12

The New York Times, July 12, 2003, Section A, p. 7 (AP story) 11

The New York Times, July 29, 2003, Section A, p. 18 (AP story) 11

INTEREST OF THE AMICUS

Neil H. Cogan has taught federal and state constitutional law since 1973.[1] He is the editor of *The Complete Bill of Rights* (New York: Oxford University Press, 1997), *Contexts of the Constitution* (New York: Foundation Press, 1997), and *The Complete Reconstruction Amendments* (New Haven: Yale University Press, forthcoming 2007), as well as unpublished course materials on constitutional law. He has maintained an interest in structural issues arising from the decennial census, reapportionment, and districting since 1979, when he was Scholar-in-Residence at the United States Department of Justice and participated in advising the Attorney General regarding the then-pending litigation arising out of the 1980 United States Decennial Census.

Amicus files this brief in support of Appellants and has obtained the consent of all parties to do so.

SUMMARY OF ARGUMENT

From *Davis v. Bandemer*, 478 U.S. 109 (1986), through *Vieth v. Jubelirer*, 541 U.S. 267 (2004), this Court and the lower federal courts have focused on outcomes in adjudicating the constitutional fairness of partisan gerrymandered districts. In *Vieth*, the Court was divided between a plurality convinced that there are no judicially manageable standards available to adjudicate whether outcomes are fair, and five concurring and dissenting

[1] This filing is written solely by the undersigned. Its printing is supported solely by his scholarship support account.

Justices convinced that manageable standards can be developed. The plurality believed that the Court should abandon its role in reviewing partisan gerrymandered districts, while the five Justices believed that the Court should continue review.

Amicus respectfully submits that this Court should not abandon its role. To the contrary, amicus submits that the Court should consider, in addition to outcomes, the process by which the outcomes were rendered. Process of course is an inherently judicial role, which fits neatly within Article I's process-oriented framework. Moreover, recent developments – the availability of instantaneous districting, the prospect of biennial redistricting, the negligible shifts in party turnover, and the heightened intrusion of federal officials and their PAC allocations – impel a turn to process.

Amicus submits that a focus upon a fair and adequate districting process, including such issues as adequate notice, competent access, full participation, open deliberation, and undictated resolution, might encourage the development of judicially manageable substantive standards.

The peculiarities of the process in the instant case make a process-directed remand appropriate. There was inadequate attention in the District Court to the extraordinary role of the Majority Leader and the use of PAC allocations, and to the absence of fundamental indicia of fairness. These matters impinge significantly on the legitimacy of governance.

ARGUMENT

I. LEGISLATIVE DISTRICTING AND REDISTRICTING SHOULD AFFORD AFFECTED GROUPS A FAIR AND ADEQUATE OPPORTUNITY TO PARTICIPATE IN AN UNDICTATED PROCESS

In *Davis v. Bandemer*, 478 U.S. 109 (1986), a plurality of this Court wrote, correctly in the view of amicus, that the federal courts should recognize claims of unfairly partisan gerrymandering. In the nineteen years since *Bandemer*, neither the Court nor the lower courts have clarified the basis for the claim of unfairness or the standard by which the claim will be determined. In *Vieth v. Jubelirer*, 541 U.S. 267 (2004), a plurality of this Court wrote that the federal courts should no longer recognize a claim because of the difficulty of formulating judicially manageable standards; however, five concurring and dissenting Justices, in four opinions, wrote that the federal courts should continue their attempt to develop such standards.

Respectfully, amicus agrees with commentators who have suggested that the Court not diminish its role in protecting the democratic functioning of our institutions. *See, e.g.*, Pildes, *Forward: The Constitutionalization of Democratic Politics*, 118 Harv. L. Rev. 28 (2004). While it is most tempting to accede to Justice Frankfurter's warning, the dangers to legitimacy that unfairly partisan gerrymandering are causing to our democracy counsel otherwise. It is respectfully submitted that there is a breakdown in the functioning of the districting process itself and there are special dangers emanating from the heightened intrusion of incumbents and powerful federal officials in that process. And it is painfully unclear

whether ordinary political forces can overcome entrenched power and money to provide a democratic fix.

With the advance of technology, the ability of Washington officials to become the chief architects of districting and redistricting has become manifest. While it once took months of effort by local workers to draw legislative lines, advances in computer technology now allow partisans in Washington to produce dozens of maps at one sitting. Lines can be drawn from Austin to the Rio Grande and transmitted to the Texas Speaker and Lieutenant Governor more quickly than the time it takes for a Justice to walk from the Court to the Capitol. Short a few votes of carrying their agenda, the Speaker and the Majority Leader in the United States House of Representatives might well redraw legislative lines and transmit them to their partisans in legislatures controlled by their parties. This makes the prospect of biennial redistricting a likely event in many states and localities.

The mischief is exacerbated by the current state of political affairs. Congressional districts have been drawn with such precision that there is little partisan turnover. For example, it is reported that "in the 2004 Congressional elections, only 13 seats in the House changed hands, and four incumbents were defeated in the general election." Adam Nagourney, *The New York Times*, February 7, 2005, Section A, p. 19, col. 1. In their home districts, Representatives are drawn principally to their "base" rather than to all their constituents, *see id.*, and in Washington they have become complicit in political polarization not experienced since the debate over Abolition.

Further, while Representatives have historically been interested and involved in decennial districting and

redistricting, technology permits them and their party leaders to be involved intimately and repeatedly. They can draw lines that will guarantee their party's victory and will guarantee their enemy's defeat. Ominously, the availability of money – not just traditional pork for constituents, but PAC money raised by Washington officials and their aides and distributed to state legislative campaign coffers – is particularly coercive, enabling Washington to dictate state redistricting.

Amicus submits that the effect on the legitimacy of the democratic process is too ominous for the Court to abandon the field. While it is true that there are some reform initiatives that have succeeded, *see* Note, *Toward a Greater State Role in Election Administration*, 118 Harv. L. Rev. 2314 (2005), nonetheless the power of incumbency and money are far too great to be sanguine about a probable grassroots solution. Amicus does not suggest that this Court order solutions outside the legislature, such as by commissions or committees, but he does suggest that this Court should order that districting be governed by a process that is fair, adequate, and undictated.

This is not to disparage the attention of the courts and parties to equal protection and First Amendment issues, but rather it is to suggest that the Court should seriously consider structural issues. Article I in its language recognizes the primary role of the States in forming districts and, particularly by the words "manner of holding elections," emphasizes the role of process. Because technology and money are shifting that traditional state role to Washington and are altering "manner" to results, it is appropriate for this Court to address the structural issues.

Respectfully, amicus submits that it violates the structure of Article I for federal incumbents and powerful federal officials to dictate the districting or redistricting process. See Issacharoff, *Gerrymandering and Political Cartels,* 116 Harv. L. Rev. 594 (2002). Further, amicus submits that it violates the structure of Article I's "manner" delegation for the States to draw political lines through a process that is not "fair and adequate" to the task. Amicus suggests that a fair and adequate process includes reasonable notice when the process will begin; an opportunity to participate (including timely availability and adequate review of plans); access to data, technology, and expertise; open and on-the-record hearings; and unbiased consideration and decision about plans.

These are judicially manageable standards to implement and review. And, once in place and operation, they may lead to judicially manageable standards regarding outcomes. Importantly, their implementation will strengthen the legitimacy of the districting process and the elections within the districts; their implementation will strengthen the national perception of the legitimacy of legislation and governance generally.

II. THIS COURT SHOULD REVERSE AND REMAND FOR A TRIAL ON WHETHER THE REDISTRICTING PROCESS WAS FAIR, ADEQUATE, AND UNDICTATED

If the media reports are correct, the instant case may be an example of a redistricting process that was heavily influenced, if not dictated, by federal officials and their access to money, and that was conducted in a manner that was not fair and adequate. It appears, for example, that legislative redistricting following the judicial districting

was not initially on the 2003 Texas legislative agenda, but that the United States House Majority Leader, Mr. Tom DeLay, did more than simply recommend that redistricting be on the agenda. According to *The Houston Chronicle,* in a February 10, 2003 report:

> U.S. House Majority Leader Tom DeLay's behind-the-scenes pressure on Texas legislators to redraw the state's congressional districts to favor more Republicans is not gaining support in the Capitol.
>
> Lt. Gov. David Dewhurst called congressional redistricting as welcome as a "contagious flu" and did not even bother to appoint a Senate redistricting committee.
>
> House Speaker Tom Craddick last year said he did not want to take up congressional redistricting if the issue was dead in the Senate. But when he appointed committees Jan. 30, he named a redistricting committee at the urging of DeLay, Capitol sources told the Houston Chronicle.

The Houston Chronicle, February 10, 2003, Section A, p. 13.

Two weeks later, *The Houston Chronicle* reported:

> Texas House Redistricting Chairman Joe Crabb has asked state Attorney General Greg Abbott whether lawmakers have a legal obligation to redraw the state's congressional districts.
>
> . . .
>
> Crabb, R-Houston, asked if the Legislature must draw new maps this year since it failed to in the year following the census.

> Does the Legislature have a mandated responsibility to enact a permanent map for the electoral period 2003 through 2010? Crabb asked in his Feb. 11 letter to the attorney general.
>
> . . .
>
> U.S. House Majority Leader Tom DeLay, R-Sugar Land, has been pushing state Republican leaders to draw new congressional districts to give the GOP a majority of the state's U.S. House seats. The Democrats currently hold a 17-15 majority.

The Houston Chronicle, February 22, 2003, Section A, p. 30.

Two months later, on April 20, 2003, *The Dallas Morning News* reported that Mr. DeLay's aides had several redistricting plans "under consideration." Second Edition, News Section, p. 5A. On April 23, 2003, *The Houston Chronicle* reported that a Democratic member of the Texas House Redistricting Committee, Rep. Richard Raymond, declared that Speaker DeLay's aides had drawn up "at least 10 different congressional maps," and that Mr. Raymond had asked Rep. Crabb for access to them. The paper reported, however, that Rep. "Crabb had filed a bill re-establishing the existing lines" and "has said he has no intention of taking any action on congressional redistricting unless Texas Attorney General Greg Abbott tells him he has to." Rep. Crabb denied that he had received any maps from Mr. DeLay or his aides. *The Houston Chronicle*, April 23, 2003, 3 Star Edition, Section A, p. 27. *See Fort Worth Star Telegram*, April 24, 2003, Final Edition, Metro Section, p. 4 ("In published reports, state Rep. Joe Crabb, the head of state House redistricting panel has said he won't proceed with congressional redistricting unless he is compelled to by the attorney general.").